Moithu Kutti bin Mohammad & Ors v Licvem Malaysia Shipping & Logistics Sdn Bhd

HIGH COURT (SHAH ALAM) — COMPANIES (WINDING UP) NO 28NCC-252–07 OF 2014
AZIMAH OMAR JC
13 APRIL 2015

Civil Procedure — Affidavits — Affidavit in reply — Extension of time to file affidavit in reply to oppose winding up petition — Deponent a Danish citizen — Whether fact that deponent was Danish citizen and currently residing in Denmark valid reason for delay in filing — Allegation that affidavit required to be sealed and attested by court, judge, public notary or consular officer of Commonwealth country — Deponent encountered difficulty in obtaining seal and attestation due to public holidays in Denmark — Whether reasons for delay in filing justified

This was an application ('encl 12') for an extension of time for a period of one month from the date of the order filed by the respondent to allow the respondent's director and majority shareholder ('Faheem') to file an affidavit in reply to oppose the petition ('encl 1') filed by the petitioners to wind up the respondent. The petitioners were the directors and shareholders of the respondent. The three petitioners had presented encl 1 to wind up the respondent via s 218(1)(f) and 218(1)(i) of the Companies Act 1965 on the grounds that there existed a mutual breakdown in trust and confidence; the directors had acted in the affairs of the respondent contrary to the interest of the respondent; and it was just and equitable that the respondent be wound up. The application for extension of time was supported by two affidavits, the affidavit-in-support ('encl 13') and an affidavit in reply ('encl 15'). In the affidavits to support the application for extension of time, it was stated that the delay in filing Faheem's was that Faheem was a Danish citizen and currently residing in Denmark. Thus, for the purpose of accepting Faheem's affidavit in this court, Faheem's affidavit was required to be sealed and attested by a court, judge, public notary or a consular officer of a Commonwealth country. Faheem was described to have encountered difficulty in order to obtain the seal and attestation of the consular officer and this had caused Faheem to be unable to file his affidavit in reply in respect of the petition within the time stipulated by the court. This application for extension of time was vehemently opposed by the three petitioners. It was submitted by the petitioners that the firm representing the respondent ('Messrs Eric Yap') did not have the capacity nor the locus to represent the respondent as no resolution was passed or approved by the respondent to appoint Messrs Eric Yap, allowing Eric to affirm the

affidavits. None of the petitioners had agreed to the appointment of Messrs Eric Yap.

Held, dismissing the application:

(1) The preliminary objection was vague and overly simplified. Referring to the petitioners' short submission on its preliminary objection which, and the fact the petitioners' solicitor did not refer to any authority and/or the respondent's article of association to support its submission, the court concluded that the petitioner was not wholehearted in pursuing its preliminary objection. Secondly, the petitioners had stated that they had no issues should Messrs Eric Yap appear on behalf of a third party. There was no need to consider the preliminary objection raised, and encl 12 shall be determined based on its merits (see paras 14–15).

(2) The court's power to extend and/or abridge time is one that is discretionary which must be exercised judicially. The legal burden to be discharged by Faheem, and to an extent, his solicitors, was to provide explanation, and to adduce satisfactory materials and facts regarding the delay in filing the affidavit in reply. Faheem's reasoning that he was unable to obtain the signature and seal due to consular offices being closed at the end of the year was unreasonable. Although they were given an extension of time on 17 October 2014, the respondent's solicitors had only forwarded the affidavit in reply to Faheem via their letter dated 25 November 2014 (see paras 19, 21 & 28).

(3) The solicitor, having knowledge that time is limited; knowing that Faheem was in Denmark; and recognising the required seal and signature of the consular officer had taken the time of one month to send the affidavit in reply to Faheem. The solicitor with knowledge that the affidavit in reply was to be filed before 29 December 2014 had elected to wait up until 25 November 2014 before sending the affidavit to Faheem. The month of November is not the end of the year just yet, knowing full well that the public holidays in European countries, including Denmark, is scheduled around Christmas at 25 December until end of the year. It was unreasonable to think that the consular offices of Commonwealth countries took a two-months leave throughout the month of December 2014 until the end of January 2015 (see paras 28–29).

(4) The alleged efforts undertaken by Faheem to set appointments at the various Commonwealth consular offices are not supported by any documentary such email, letters, endorsement of attendance or other documents from the said consular offices. The document exhibited were merely emails of communication between Eric and Faheem. It did not show that Faheem did make efforts to fix appointment or had gone to the consular offices to obtain the seal and signature. The time of two months taken to obtain the seal and signature of a consulate officer shows

Faheem's indifferent and not serious attitude in respect of this matter. Faheem's conduct was a delaying tactic to prevent the petition from being heard. The delay in filing the affidavit in reply was prejudicial to the petitioners (see paras 30–31 & 34).

[Bahasa Malaysia summary

Ini adalah permohonan ('lampiran 12') untuk lanjutan masa bagi tempoh satu bulan dari tarikh perintah yang difailkan oleh responden untuk membenarkan pengarah responden dan pemegang saham majoriti ('Faheem') memfailkan afidavit jawapan membantah petisyen itu ('lampiran 1') yang telah difailkan oleh pempetisyen-pempetisyen untuk menggulungkan responden. Pempetisyen-pempetisyen ialah pengarah-pengarah dan pemegang-pemegang saham responden. Ketiga-tiga petisyen telah mengemukakan lampiran 1 untuk menggulung responden melalui s 218(1)(f) dan 218(1)(i) Akta Syarikat 1965 atas alasan bahawa terdapat kegagalan bersama dalam kepercayaan dan keyakinan; pengarah-pengarah itu telah bertindak dalam urusan responden yang bertentangan dengan kepentingan responden; dan ia adalah adil dan saksama agar responden digulungkan. Permohonan untuk lanjutan masa disokong oleh dua afidavit, afidavit sokongan ('lampiran 13') dan afidavit jawapan ('lampiran 15'). Dalam afidavit-afidavit untuk menyokong permohonan lanjutan masa, ia dinyatakan bahawa kelewatan memfailkan afidavit Faheem adalah kerana Faheem ialah warganegara Denmark dan kini menetap di Denmark. Oleh itu, bagi tujuan menerima afidavit Faheem di mahkamah ini, afidavit Faheem perlu dimeterai dan disahkan oleh mahkamah, hakim, notari awam atau pegawai konsular negara Komenwel. Faheem digambarkan mengalami kesukaran bagi tujuan memperoleh meterai pengesahan pegawai konsular dan ini telah menyebabkan Faheem tidak dapat memfailkan afidavit jawapannya berkaitan petisyen itu dalam tempoh masa yang telah ditetapkan oleh mahkamah. Permohonan untuk lanjutan masa ini telah ditentang sekeras-kerasnya oleh ketiga-tiga pempetisyen. Ia dihujahkan oleh pempetisyen-pempetisyen itu bahawa firma yang mewakili responden ('Tetuan Eric Yap') tidak mempunyai kapasiti atau locus untuk mewakili responden kerana tiada resolusi telah diluluskan atau dibenarkan oleh responden untuk melantik Tetuan Eric Yap, yang membenarkan Eric Yap mengesahkan afidavit-afidavit itu. Tiada antara pempetisyen-pempetisyen itu telah bersetuju dengan pelantikan Tetuan Eric Yap.

Diputuskan, menolak permohonan:

(1) Bantahan awal adalah kabur dan terlalu dipermudahkan. Merujuk kepada hujah pendek pempetisyen-pemetisyen berhubung bantahan awalnya yang mana, dan pada hakikatnya peguamcara pempetisyen-pempetisyen tidak merujuk kepada mana-mana autoriti dan/atau artikel syarikat responden untuk menyokong hujahnya, mahkamah telah membuat kesimpulan bahawa pempetisyen tersebut

tidak sepenuh hati meneruskan bantahan awalnya. Kedua, pempetisyen-pempetisyen telah menyatakan bahawa mereka tiada isu jika Tetuan Eric Yap hadir bagi pihak pihak ketiga. Tiada keperluan untuk mempertimbangkan bantahan awal yang ditimbulkan, dan lampiran 12 hendaklah ditentukan berdasarkan meritnya (lihat perenggan 14–15).

(2) Kuasa mahkamah untuk melanjut dan/atau memendekkan masa adalah suatu yang berdasarkan budi bicara yang perlu dilaksanakan secara kehakiman. Beban perundangan yang perlu dilaksanakan oleh Faheem, dan setakat mana, peguam caranya, perlu mengemukakan penjelasan, dan untuk mengemukakan bahan dan fakta memuaskan berkenaan kelewatan memfailkan afidavit jawapan itu. Alasan Faheem yang dia tidak dapat memperoleh tanda tangan dan meterai pegawai konsular kerana ia hujung tahun adalah tidak munasabah. Walaupun mereka telah diberikan lanjutan masa pada 17 Oktober 2014, peguamcara responden hanya mengemukakan afidavit jawapan itu kepada Faheem melalui surat mereka bertarikh 25 November 2014 (lihat perenggan 19, 21 & 28).

(3) Peguamcara itu, yang mempunyai pengetahuan bahawa masa adalah terhad; mengetahui bahawa Faheem berada di Denmark; dan menyedari meterai dan tandatangan pegawai konsular yang diperlukan telah mengambil masa sebulan untuk menghantar afidavit jawapan itu kepada Faheem. Peguamcara itu mengetahui bahawa afidavit jawapan perlu difailkan sebelum 29 Disember 2014 telah memilih untuk tunggu sehingga 25 November 2014 sebelum menghantar afidavit itu kepada Faheem. Bulan November bukan lagi akhir tahun, dan amat mengetahui bahawa cuti awam di negara Eropah, termasuk Denmark, dijadualkan sekitar Krismas pada 25 Disember sehingga akhir tahun. Ia tidak munasabah untuk memikirkan bahawa pejabat-pejabat konsular negara-negara Komenwel mengambil dua bulan cuti sepanjang bulan Disember 2014 sehingga akhir Januari 2015 (lihat perenggan 28–29).

(4) Usaha yang dikatakan telah dilakukan oleh Faheem untuk menetapkan temujanji di pelbagai pejabat-pejabat konsular Komenwel tidak disokong oleh apa-apa dokumen seperti emel, surat, pengindorsan kehadiran atau dokumen lain daripada pejabat-pejabat konsular tersebut. Dokumen yang diekshibitkan hanya emel-emel dan komunikasi antara Eric dan Faheem. Ia tidak menunjukkan bahawa Faheem tidak berusaha untuk menetapkan temujanji atau telah pergi ke pejabat-pejabat konsular untuk mendapat meterai dan tandatangan. Masa dua bulan yang diambil untuk memperoleh meterai dan tandatangan pegawai konsular menunjukkan sikap acuh tak acuh dan sikap tidak serius Faheem berkenaan perkara ini. Kelakuan Faheem merupakan taktik melewatkan bagi mengelak petisyen daripada didengar. Kelewatan memfailkan afidavit jawapan itu bersifat prejudis

kepada pempetisyen-pempetisyen (lihat perenggan 30–31 & 34).]

Notes

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 415–441.

Cases referred to

Abdul Rahim Ponniah bin Abdullah v Kulim Intensive Driving Centre Sdn Bhd [2000] 6 MLJ 584, HC (refd)
Cheah Teong Tat v Ho Gee Seng & Ors [1974] 1 MLJ 31 (refd)
Gan Boon Kyee v Yap Hong Sin & Anor [1997] 2 MLJ 598, CA (refd)
Gan Hay Chong v Slow Klan Yuh & Anor [1975] 1 MLJ 41 (refd)
Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)
Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453, CA (refd)
Punca Klasik Sdn Bhd v Seok Kim Leow [1996] 5 MLJ 241, HC (refd)
Ratnam v Cumarasamy and Another [1964] 3 All ER 933, PC (refd)

Legislation referred to

Companies Act 1965 s 218(1)(f), (1)(i)
Rules of Court 2012 O 41 r 12

R Rishi (Kamil Hashim Raj & Lim) for the petitioners.
Eric Yap Beng Ong (Eric Yap Assoc) for the defendant.

Azimah Omar JC:

[1] Enclosure 12 is an application for an extension of time for a period of one month from the date of the order filed by the solicitors representing the respondent (Licvem Malaysia Shipping & Logistics Sdn Bhd) to allow the respondent's director, Faheem Ahmad Khan ('Faheem') who is also the respondent's majority shareholder, to file an affidavit in reply to oppose the petition (encl 1) which was filed by the petitioners to wind up the respondent.

[2] The brief facts of the case are:

(a) the petitioners, (i) Moithu Kutti bin Mohammad ('the first petitioner'), (ii) Jasen a/l Jeyaratnam ('the second petitioner'), (iii) M Logeswaran a/l Marimuthu ('the third petitioner) are Malaysian citizens. The petitioners will also be periodically referred to as the three petitioners;

(b) the three petitioners are the directors and shareholders of the respondent;

(c) the second and third petitioners respectively, prior to the formation of the respondent, were respectively the shipping manager and senior operations executive in a company called Sea Hawk Global Lines Sdn

Bhd ('Sea Hawk') which runs the business of logistics, storage, sea freight consolidation & de-consolidation, air freight consolidation and de-consolidation, chartering, break bulk, project cargo and stevedoring;

(d) in the course of conducting their work, both the second and third petitioners established professional relationship with a Mauritius based company called AEL (Mauritius) Ltd ('AEL'), from which a contract between Sea Hawk and AEL was created;

(e) on the other hand, the first petitioner was at all material times a director and a shareholder of Baiduri Dimensi Sdn Bhd ('Baiduri Dimensi'), wherein Baiduri Dimensi is a company that provides warehousing space and logistics requirements to Sea Hawk;

(f) with the expertise and experience of the second and third petitioner, they both proposed to the first petitioners to form a company, which culminated in the formation of the respondent;

(g) in August 2012, the three petitioners and Faheem, a Danish citizen, conducted several business discussions and business ventures with AEL. Later, on 20 September 2012 the respondent was incorporated; and

(h) when the respondent was formed, it was agreed that 70% of the respondent's shares will be held by Faheem, while the balance 30% will be equally distributed between the three petitioners.

[3] On 22 July 2014, the three petitioners had presented encl 1 to wind up the respondent via s 218(1)(f) and 218(1)(i) of the Companies Act 1965 on the grounds that there exists a mutual breakdown in trust and confidence, the directors had acted in the affairs of the respondent contrary to the interest of the respondent, and it was just and equitable that the respondent be wound up.

[4] Consequently, Faheem on 25 September 2014 filed a notice of motion to stay the petition on the ground that the three petitioners had conspired to cheat the respondent by forming a new company for the purpose of taking over the respondent's business. On that ground, Faheem and a joint venture company named Licvem Shipping & Trading Aps (Denmark) filed a civil claim No 22NCVC-405–08 of 2014 against both the petitioners and the new company formed by the three petitioners, JLM Logistics (M) Sdn Bhd.

[5] Returning to encl 12, the application for extension of time was supported by two affidavits, the affidavit-in-support (encl 13) and an affidavit in reply (encl 15) which were deposed and affirmed by one Eric Yap Beng Ong, a solicitor of Messrs Eric Yap & Assoc ('Messrs Eric Yap'). Both of these affidavits will be referred to as 'Eric's affidavits'.

[6] In Eric's affidavits to support the application for extension of time, it was

stated that the delay in filing Faheem's affidavit is that Faheem, is a Danish citizen and currently residing in Denmark. Thus, for the purpose of accepting Faheem's affidavit in this court, Faheem's affidavit is required to be sealed and attested by a court, judge, public notary or a consular officer of a Commonwealth country. Faheem was described to have encountered difficulty in order to obtain the seal and attestation of the consular officer and this had caused Faheem to be unable to file his affidavit in reply in respect of the Petition within the time stipulated by the court.

[7] This application for extension of time was vehemently opposed by the three petitioners via the filing of the petitioners' affidavit in reply (encl 14) affirmed by the second petitioner which was also deposed on behalf of the first and third petitioner.

[8] The petitioners' solicitor raised a preliminary objection in respect of the affidavit-in-support affirmed by Eric and/or Messrs Eric Yap. It was submitted by the petitioners' solicitors that Messrs Eric Yap does not have the capacity nor the locus to represent the respondent as no resolution was passed or approved by the respondent to appoint Messrs Eric Yap, allowing Eric to affirm the affidavits. Further, none of the petitioners had agreed to the appointment of Messrs Eric Yap.

[9] According to the petitioners' solicitor, the preliminary objection was raised during the case management before the senior assistant registrar and had informed that they will submit on the matter before the High Court judge.

[10] In respect of the preliminary objection, this court has went through the written submission filed by Messrs Eric Yap but unfortunately the objection raised by the petitioners' solicitor was not answered by Messrs Eric Yap.

[11] However, this court had also went through the notes of proceedings in respect of the case management before the senior assistant registrar to review the details of what transpired during the case management. During the case management fixed on 24 September 2014, which was held to schedule the hearing of encl 1, the petitioners' solicitor had indeed raised a preliminary objection against the appointment of Messrs Eric Yap as the respondent's solicitor. There was no answer as to whether Messrs Eric Yap was appointed by the respondent or by the majority shareholder, Faheem. During the case management, the solicitor from Messrs Eric Yap had requested for an adjournment in order to file a notice of motion to stay the petition whilst awaiting instructions from their client who was in Denmark.

[12] The senior assistant registrar then scheduled 17 October 2014 as the next case management date. On 17 October 2014, the petitioners' solicitor had

again raised the issue of locus in respect of the respondent's solicitor but have no issues should Messrs Eric Yap appear on behalf of a third party. Messrs Eric Yap however informed the court that they will utilise the affidavit filed in support of their motion to stay the hearing of encl 1 as the affidavit in reply to oppose the petition. The senior assistant registrar then ordered for the notice of intention to use affidavit to be filed before 27 October 2014.

[13] On 15 December 2014, Messrs Eric Yap informed the court that the notice of motion (encl 6) filed with the purpose of staying the proceedings of encl 1 which was filed on 19 October 2014. However, Messrs Eric Yap was awaiting the affidavit of Faheem, and requested for more time to file Faheem's affidavit. The senior assistant registrar ordered for the respondent's affidavit to be filed before 29 December 2014. The petitioner's solicitors again informed that they will continue to pursue their preliminary objection in respect of respondent's solicitor's locus. The senior assistant registrar fixed the case management of the petition on 22 January 2015. During case management held on 22 January 2015, the solicitor from Messrs Eric Yap had informed the court that the respondent had filed encl 12 on 30 December 2014 and simultaneously requests for an extension of time to allow the respondent to file a reply against the affidavit which was filed by the petitioners on 14 January 2015 in opposition of the respondent's application for extension of time. The senior assistant registrar further fixed the matter for case management on 25 February 2015, and later the hearing of encl 12 was fixed before the High Court judge on 13 April 2015.

[14] The court will now touch on the preliminary objection raised by the petitioners' solicitor, which will be considered based on two factors. Firstly, although the petitioners' solicitor had consistently raised the preliminary objection up until the hearing of encl 12, but upon reading the petitioners' submission, the court finds that the point submitted was vague and overly simplified. In the beginning of the proceedings before the senior assistant registrar, the petitioners' solicitor objected to the appearance of Messrs Eric Yap on the grounds that no resolution was approved to appoint the firm. However, the petitioners' submission raised another issue altogether by questioning the capacity of Faheem who was alleged to have no locus to represent the respondent, since Faheem in the Civil Suit No 22NCVC-405–08 of 2014 had commenced this civil suit by way of derivative action. In such a situation, Faheem cannot approbate and reprobate. Referring to the petitioners' short submission on its preliminary objection which, and the fact the petitioners' solicitor did not refer to any authority and/or the respondent's article of association to support its submission, the court concludes that the petitioners' solicitor was not wholehearted in pursuing its preliminary objection. Secondly, the petitioners' solicitor had on 17 October 2014 stated that they had no issues should Messrs Eric Yap appear on behalf of a third party. Does this mean that

they agree to Messrs Eric Yap's appearance in the course of this proceedings? A

[15] Based on these grounds the court is therefore of the view that there is no need to consider the preliminary objection raised, and shall determine encl 12 based on its merits. B

[16] The court is aware of the affidavit in reply affirmed by Faheem on 29 January 2015 and filed in court on 9 February 2015, which serves as the basis of the application under encl 12 as it was filed beyond the time period specified by the senior assistant registrar. C

[17] Perusing the available notes of proceedings in respect of the case management held before the senior assistant registrar, it is evident that the events in respect of the affidavit filed by Faheem have been going on since September. From the date when the petition was filed, there has been only one affidavit affirmed by Faheem dated 25 September 2014 in support of the application for stay of proceeding of encl 1. D

[18] I am in agreement of the petitioners' solicitor that Faheem should have filed his affidavit in reply on 24 November 2014 and have failed to do so. The senior assistant registrar then during case management held on 12 December 2014 allowed for a final extension of time to file Faheem's affidavit in reply before or on 29 December 2014. E

F

[19] It is trite law that the court's power to extend and/or abridge time is one that is discretionary which must be exercised judicially (see *Ratnam v Cumarasamy and Another* [1964] 3 All ER 933; *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105; *Punca Klasik Sdn Bhd v Seok Kim Leow* [1996] 5 MLJ 241; *Gan Hay Chong v Slow Klan Yuh & Anor* [1975] 1 MLJ 41; and *Cheah Teong Tat v Ho Gee Seng & Ors* [1974] 1 MLJ 31). G

[20] Alauddin J (as His Lordship then was) in the case of *Abdul Rahim Ponniah bin Abdullah v Kulim Intensive Driving Centre Sdn Bhd* [2000] 6 MLJ 584, held, inter alia, that: H

> ... In exercising the discretion, the following factors will be considered (1) whether the delay caused by the defendant company unjustified or unreasonable (2) what are the reasons for the delay (3) whether the defence raised by the defendant company had any merits; and (4) will the plaintiff prejudiced in any way should the application be granted. I

[21] In this case, the court has to consider whether the application filed by Messrs Eric Yap is one that is suitable for this court to exercise its discretionary power by giving due consideration to the explanation provided by Faheem for

his delay. In other words, the legal burden to be discharged by Faheem, and to an extent, his solicitors, is to provide explanation, and to adduce satisfactory materials and facts regarding the delay in filing the affidavit in reply.

[22] As such, the question to be answered is whether Faheem and his solicitors have successfully provided the court with a satisfactory explanation in order to convince the court to exercise its discretionary power to allow extension of time. Detailed observation of the chain of events and the reason raised by the respondent for the delay must be analysed by the court.

REASON FOR DELAY

[23] This court is fully aware of O 41 r 12 of the Rules of Court 2012 ('the ROC') which provides as follows:

> Affidavit taken outside Malaysia admissible without proof of seal (O 41 r 12)
>
> 12 A document purporting to have affixed or impressed thereon or subscribed thereto the seal or signature of a Court, Judge, notary public or person having authority to administer oaths in a Commonwealth country and in the case of any other country the seal or signature of a consular officer of a Commonwealth country in testimony of an affidavit being taken before it or him shall be admitted in evidence without proof of the seal or signature being the seal or signature of that Court, Judge, notary public or person.

[24] According the Eric's affidavit, Messrs Eric Yap via their letter dated 25 November 2015 (exh 'EYBO1', encl 13) had sent Faheem's affidavit in reply to obtain the seal and signature of an officer at the consular's office. Since there are no Malaysian embassy and/or consular in Denmark, Faheem was required to obtain the seal and signature from a consular officer of other Commonwealth countries. However it was alleged that Faheem could not speak nor obtain assistance from the consular offices of Singapore, Tanzania, Ghana and Pakistan. Further as it was the end of year in Denmark and most consular offices were closed for the holidays.

[25] Further, Eric states that Faheem faced difficulties to obtain the seal and signature as he was required to fix an appointment with the consular offices beforehand. To support this, the respondent exhibited the email communications between Eric and Faheem (exh 'EYBO2', encl 13).

[26] The court agrees with the petitioners' solicitor that the reason for delay put forward by Faheem must be put under the microscope together with the actions taken by Faheem in this suit from the moment encl 1 is served onto the respondent.

[27] The solicitor from Messrs Eric Yap had asked for an adjournment to file the affidavit in reply since 17 October 2014. The filing date has since been extended to 15 December 2014. However the solicitor was still waiting for a sealed copy of the affidavit on 15 December 2014, and resulted in the senior assistant registrar to giving a final date on 29 December 2014. The delay should not be calculated from 29 December 2014 as the extension of time had been given from the month of October, and later in November which was later again extended to 29 December 2014. Faheem's affidavit in reply was only filed after a three month period on 9 February 2015.

[28] This court is of the opinion that Faheem's reasoning that he was unable to obtain the signature and seal due to consular offices being closed at the end of the year is unreasonable. First of all, although they were given an extension of time on 17 October 2014, the respondent's solicitors had only forwarded the affidavit in reply to Faheem via their letter dated 25 November 2014. Two things must be observed. One, the solicitor, having knowledge that time is limited; knowing that Faheem was in Denmark; and recognising the required seal and signature of the consular officer had taken the time of one month to send the affidavit in reply to Faheem. Two, the solicitor with knowledge that the affidavit in reply was to be filed before 29 December 2014 had elected to wait up until 25 November 2014 before sending the affidavit to Faheem.

[29] Secondly, the court observes that the month of November is not the end of the year just yet, knowing full well that the public holidays in European countries, including Denmark, is scheduled around Christmas at 25 December until end of the year. The court cannot accept the reasoning that the consular offices of Commonwealth countries were closed and there was a long holiday throughout December until 27 January 2015 when Faheem finally obtained the seal and sign his affidavit at a Malaysian consular in Stockholm, Sweden. It is unreasonable to think that the consular offices of Commonwealth countries took a two months leave throughout the month of December 2014 until the end of January 2015.

[30] Apart from this, the alleged efforts undertaken by Faheem to set appointments at the various Commonwealth consular offices are not supported by any documentary such email, letters, endorsement of attendance or other documents from the said consular offices. What was exhibited by Eric was exh 'EYBO2'. However the document exhibited are merely emails of communication between Eric and Faheem. It does not show that Faheem did indeed made efforts to fix appointment or had indeed went to the consular offices to obtain the seal and signature. The emails in exh 'EYBO2', in the opinion of the court, does not prove or support the efforts made by Faheem.

Additionally, the time of two months taken to obtain the seal and signature of a consulate officer shows Faheem's indefferent and not serious attitude in respect of this matter.

[31] In this regard, this court is in agreement with the petitioners' solicitor that Faheem's conduct is a delaying tactic to prevent the petition from being heard. Such a nonchalant attitude must not be condoned by this court.

[32] In the case of *Gan Boon Kyee v Yap Hong Sin & Anor* [1997] 2 MLJ 598, the Court of Appeal in dismissing an appeal against judicial commissioner's decision refusing an application for extension of time, had held that:

> The learned judicial commissioner exercised her discretion correctly. She took into account all relevant considerations and directed herself correctly on the law. She asked herself the right question and her decision accorded with the justice of the case. The judicial commissioner was entirely correct in classifying the *conduct of the instant appellant as 'leisurely paced' because of the sluggish pace at which the appellant moved the court.* It is axiomatic that the law assists the vigilant and not the indolent. Further, the court was entirely unconvinced with the arguments in support of this appeal. Therefore, the appeal was dismissed (see p 601D-F). (Emphasis added.)

[33] While, in *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 at p 470, the Court of Appeal in its decision held, inter alia:

> Order 32 r 13(2) of the RHC was specifically enacted *to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavits at the last minute.* The rule is mandatory. Of course, the court always has a discretionary power to extend time (see the Court of Judicature Act 1964 item 8 of the Schedule and O 3 r 5 of the RHC 1980). *But very powerful reasons must be advanced* and the application for an extension should preferably be filed before time expired ... (Emphasis added.)

[34] Based on the above, the explanation provided by the respondent in respect of the delay in filing the affidavit are found to be unreasonable to warrant the court to exercise its discretionary power to allow an extension of time for the respondent to file Faheem's affidavit. The delay in filing the affidavit in reply is prejudicial to the petitioners. The court therefore refuse to allow the application filed under encl 12 with costs of RM2,500 to be paid by Faheem to the three petitioners.

Application dismissed.

Reported by Afiq Mohamad